International Journal of Arts and Social Science www.ijassjournal.com
ISSN: 2581-7922,
Volume 7 Issue 12, December 2024

Judicialization of Health and the Reserve of the Possible: Balancing Individual Rights and SUS Sustainability

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ABSTRACT : *This study aims to analyze judicial decisions related to the treatment of prostate cancer patients in the state of Pernambuco, with a focus on the application of the theory of the reserve of the possible. The research adopted a qualitative approach based on the documentary analysis of judicial rulings issued in 2019. Favorable decisions were primarily based on the constitutional right to health and human dignity, while unfavorable decisions were grounded in insufficient evidence or the absence of requested treatments in the guidelines of the Unified Health System (SUS). Although the theory of the reserve of the possible was not explicitly mentioned in many unfavorable rulings, its logic was present in cases involving high-cost treatments, justified by the argument that granting such treatments would compromise public resources and collective care. The research highlights the need to balance the guarantee of individual health rights with the financial sustainability of the SUS, proposing a more structured dialogue between the Judiciary, health managers, and the legislature to ensure appropriate access to treatments without jeopardizing public resource management.*

KEYWORDS -*Judicialization of Health, Public Health Policies, Right to Health*

I. INTRODUCTION

The judicialization of health is a global phenomenon reflecting the increasing demand from the population for constitutionally guaranteed rights, especially the right to health. Understood as the intervention of the Judiciary to guarantee access to medications, treatments, and medical procedures, judicialization has been seen both as a means of protecting rights and as a challenge to public management of resources. In many countries, including Brazil, access to health is guaranteed by constitutions or legislation that recognize this right as fundamental, placing the State as responsible for its implementation. This growing judicialization has sparked debates about the limits and responsibilities of the State in providing health services, particularly in contexts of limited financial resources [1].

In Brazil, the judicialization of health gained significant proportions after the promulgation of the Federal Constitution of 1988, which in its Article 196 establishes that "health is a right of all and a duty of the State." [2] The inclusion of this right in the constitutional text made the public health system, the Unified Health System (SUS), the main agent responsible for offering universal, comprehensive, and equal access to health services for the entire Brazilian population [3]. However, the implementation of this right has faced numerous challenges, from chronic underfunding of SUS to inadequate infrastructure, especially in more remote regions of

the country [4]. These gaps in care have led thousands of Brazilians to seek the Judiciary to ensure access to treatments and medications not provided by the public system [5].

The judicialization of health in Brazil primarily involves individual demands from patients who need high-cost medications, treatments outside the scope offered by SUS, or urgent surgical procedures [6]. The growth of this phenomenon has created a dilemma between protecting individual rights, guaranteed by the Constitution, and the efficient management of public resources. The increase in judicial demands places the State under constant pressure, as judicial decisions can compel it to redirect funds for the care of a single individual, to the detriment of other health policies benefiting a larger number of citizens [5]. In this context, questions arise about the extent to which the Judiciary can intervene in the formulation and implementation of public health policies without compromising the sustainability of SUS [7].

A concept that has gained relevance in this debate is the theory of the "reserve of the possible." This theory, developed in the German legal context, states that the State can only be obligated to guarantee social rights, such as the right to health, within the limits of its financial resources [8]. In other words, while the State has the obligation to guarantee the right to health, it cannot be forced to provide something that exceeds its budgetary capacity and compromises the execution of other fundamental rights or essential public services [9]. In Brazil, the application of the theory of the reserve of the possible has been the subject of intense debates, especially in cases of judicialization of health [10]. On one hand, there is the argument that this theory is crucial to preserve the sustainability of the public system and ensure equity in access to health resources. On the other, many critics argue that the reserve of the possible can be misused to deny treatments or medications that are vital to the survival of patients [11].

The influence of the theory of the reserve of the possible on judicial decisions related to health has become increasingly visible, especially in cases where patients request high-cost treatments or medications not included in the SUS supply lists [12]. Judges, when analyzing these requests, often face the challenge of balancing the individual right to health, guaranteed by the Constitution, with the financial viability of the State [13]. The decision to grant or deny a treatment often takes into account the potential impact of such a decision on public finances and the system's ability to continue providing care to other patients. Thus, the theory of the reserve of the possible emerges as a criterion that judges use to justify the denial of high-cost treatments, arguing that providing these resources would compromise the provision of other health services for the population [6].

However, the application of the theory of the reserve of the possible in Brazil faces resistance. The Supreme Federal Court (STF), for example, has been cautious in accepting this argument in health-related cases, especially when life is at risk [14]. The STF has reaffirmed, in several rulings, that the reserve of the possible cannot be used as an excuse to disregard fundamental rights, particularly in situations involving risks to life or physical integrity [7]. The court argues that the State must demonstrate clearly and objectively that providing a particular treatment or medication would severely harm the public budget and the execution of other essential policies [15]. Nevertheless, the theory of the reserve of the possible continues to be applied by many first-instance judges, who use it as a basis for decisions that deny requests for experimental or high-cost treatments, especially in cases where the requested treatments are not included in the SUS guidelines [16].

The use of the theory of the reserve of the possible in the judicialization of health raises a number of ethical and legal questions. On one hand, there is the need to protect the fundamental right to health, ensuring that all citizens have access to the treatments they need [17]. On the other hand, there are concerns about the fair and efficient allocation of public resources, so that granting a treatment to a single patient does not compromise the provision of services to many others [18]. This tension between individual and collective rights is one of the main dilemmas faced by the Judiciary in Brazil, and the application of the theory of the reserve of the possible has proven to be an important tool in trying to balance these two principles [6].

This article proposes an in-depth analysis of the judicialization of health in Brazil, focusing on the application of the theory of the reserve of the possible and its implications in judicial decisions.

II. RESEARCH METHOD

The methodology of this study follows a qualitative approach, primarily based on documentary and theoretical analysis. The research was developed with the objective of understanding the justifications used by judges in judicial decisions and investigating the application of the theory of the reserve of the possible in the cases analyzed. For this purpose, documentary analysis was chosen as the main method, with the collection of judicial decisions from the state of Pernambuco in the year 2019. These decisions were extracted from public databases of the Court of Justice of Pernambuco.

Initially, only decisions involving patients diagnosed with prostate cancer were selected. By limiting the analysis period to the year 2019, we ensured a uniform context that reflects public policies and the specific challenges faced during that period. Additionally, we established as a criterion the implicit or explicit presence of the theory of the reserve of the possible in the decisions, aiming to identify it as a justification for granting or denying the requests.

Content analysis was employed to identify patterns in the justifications of judges, focusing on the relationship between the right to health and the budgetary limitations of the State, as well as mentions of insufficient documentation or the absence of therapeutic provisions in SUS guidelines. This technique allowed us to categorize the decisions and identify trends in the Judiciary's response to the demands of patients.

In addition to the documentary analysis, the research included a theoretical approach, based on legal and academic literature that addresses the theory of the reserve of the possible and its application in Brazil. Scientific articles, legal doctrines, and specialized texts were consulted to contextualize the discussion about the right to health, particularly in situations where the State faces resource limitations. This theoretical support was essential for understanding how the theory of the reserve of the possible influences judicial decisions and how it fits into the broader debate about the realization of social rights in the country.

The final stage of the methodology consisted of a critical analysis of the decisions, evaluating the implications of the judicialization of health in the state of Pernambuco and the influence of the theory of the reserve of the possible on the judges' decisions. This analysis aimed to examine the impact of the decisions on the sustainability of SUS, as well as the tensions between guaranteeing the right to health and the budgetary limitations of the State.

III. RESULTS AND DISCUSSIONS

The unfavorable decisions represent a minority of the analyzed cases, accounting for approximately 4% of the total rulings (Table 1). Although this percentage is relatively small, these decisions provide valuable insights into the criteria used by judges to deny the provision of high-cost medications or treatments requested by patients.

Table 1. Preliminary decision in cases of prostate cancer patients in Pernambuco in 2019.

	N	%
Decision		
Favorable	84	96%
Unfavorable to the claimant	04	4%
Total	**88**	**100%**
Reasons for Unfavorable Preliminary Decision		
Lack of Adequate Medical Evidence	02	50%
Treatments Not Included in SUS Guidelines	01	25%

High Costs Without Technical Justification	01	25%
Total	**04**	**100%**

Source: Judicial process survey by TJPE – 2019. Prepared by the author.

The favorable judicial decisions in health-related lawsuits are predominantly based on the constitutional right to health and the protection of human dignity. The most common argument is the guarantee of the right to health as stipulated in Article 196 of the Federal Constitution, which defines health as a universal right and a duty of the State. Judges emphasize that the State is obligated to provide essential medical treatments regardless of cost to protect the life and dignity of patients. For example, a ruling might state, "Health is the right of all and the duty of the State, guaranteed by the Federal Constitution, and the provision of the requested treatment is necessary to preserve life and the dignity of the plaintiff."

The principle of human dignity is another key foundation. Judges interpret that denying the necessary treatment not only risks the patient's health but also violates their dignity, which is a constitutional right. This implies that the State must ensure comprehensive access to health care. A ruling in this context might state, "Denying the plaintiff the treatment they need violates the human dignity principle, a constitutional right, and undermines the right to health guaranteed by the Constitution."

Protection of life is also a recurring argument. Magistrates argue that the failure to provide the requested treatment by the State can directly threaten the patient's survival. Therefore, granting the treatment is seen as a way to ensure this fundamental right. A typical ruling might read: "Granting the requested medication is crucial to ensure the protection of the plaintiff's life, as the State's omission places their survival at risk."

Moreover, favorable decisions often consider the socioeconomic vulnerability of the patients. Many plaintiffs are from low-income backgrounds and depend exclusively on the Unified Health System (SUS), which justifies judicial intervention to ensure access to the necessary treatments. For instance, a judge might declare, "The plaintiff is of low income, unable to afford the treatment costs, which justifies this Court's intervention to guarantee access to the necessary medication."

The Health Care Law (Law 8.080/1990) is also frequently cited, as it regulates the SUS and establishes the State's obligation to provide comprehensive health assistance, including high-complexity medications and treatments. Rulings might argue that "under the Health Care Law, SUS is obligated to provide comprehensive therapeutic assistance, which includes the requested treatment to ensure the right to health."

Additionally, judges often refer to consolidated case law, observing that higher courts recognize the State's obligation to provide essential medical treatments, especially in cases where the lack of State action may result in severe or irreversible harm. A ruling may note, "Consolidated case law recognizes the State's duty to provide medical treatments to patients who cannot afford them when essential to preserving health."

In cases where the standardized SUS treatments are proven ineffective, judges also tend to rule favorably. If it is shown that the treatment offered by SUS is insufficient to address the disease, the judge may order the State to provide more advanced alternatives. For example, a ruling might state: "It has been proven in the records that the treatment currently offered by SUS has not been effective in combating the plaintiff's disease, justifying the granting of an alternative treatment."

These judicial decisions reflect a commitment to protecting patients' fundamental rights, especially the most vulnerable. However, they also raise concerns about the sustainability of the public health system. Granting high-cost treatments, if not accompanied by adequate resource management, may negatively impact the system as a whole, raising questions about how to balance individual rights with the collective needs of SUS.

An analysis of unfavorable decisions reveals that lack of sufficient evidence and inadequate medical justification are the primary reasons for denying judicial requests. In many cases, patients failed to convincingly demonstrate the urgency or specificity of the requested treatments, leading judges to reject their petitions. One of the most common reasons for rejection is the lack of adequate medical documentation, where presented reports are considered superficial and do not detail the need for high-cost treatments. A typical sentence might

state: "Given the lack of a medical report that proves the specific need for the requested treatment, I reject the petition."

In addition to reports, the lack of detailed exam results is another critical issue. Rulings indicate that, in many cases, the exams provided by patients do not demonstrate the severity of the condition or the ineffectiveness of the standard treatments offered by SUS. Sentences such as "The exams presented do not show the failure of the standard treatment, and therefore do not justify granting the experimental medication" are common.

Another recurring reason for unfavorable rulings is that the requested treatments are not included in SUS's therapeutic guidelines. Many medications or treatments requested are considered experimental or do not follow the standards set by the public health system. In these cases, the judiciary maintains a position of respect for SUS guidelines, as illustrated by rulings that state, "The treatment requested by the plaintiff is not included in SUS's therapeutic guidelines, and there is no evidence that it would be more effective than the treatment provided by the system."

Furthermore, the high costs of treatments are often cited as a reason for denial, especially when there is no technical justification for these expenses. Judges assess the financial viability of SUS and, in the absence of clear technical justifications, high-cost treatments are not granted. Examples of rulings in this regard might mention, "There is no technical justification showing the need for an alternative treatment to the one offered by SUS, which would be substantially cheaper."

Another factor frequently cited is the lack of adequate financial documentation. In some cases, patients failed to provide documents that sufficiently prove their inability to cover the treatment costs. This also leads to rejection, as shown in rulings stating, "The plaintiff has not sufficiently proven their financial incapacity to afford the treatment, as they lack documents proving their income."

These unfavorable decisions raise important questions about the role of documentary evidence in health-related judicialization processes. The judiciary generally adopts a rigorous stance regarding the need for detailed documentation to justify granting treatments outside SUS's standards. The absence of complete reports, exams demonstrating the urgency of treatment, or clear financial documentation often leads to the denial of requests.

The rulings also highlight the limitations of SUS in providing innovative or experimental treatments. By adhering to established guidelines, the judiciary seeks to ensure that public resources are used coherently and responsibly. Another concern raised in decisions is the high cost of treatments, especially when there is no technical justification for these expenses over more accessible alternatives.

Ultimately, the unfavorable decisions indicate that it is crucial for patients and their representatives to present robust and detailed evidence, both clinically and financially, to justify the granting of high-cost treatments. Health judicialization, in these cases, requires rigorous document preparation and clear technical justification, allowing the judiciary to assess requests in a fair and substantiated manner.

Although explicit references to the theory of "the reserve of the possible" are not present in the analyzed unfavorable rulings, a theoretical discussion on its application within the context of health judicialization in Brazil can be developed. The theory of the reserve of the possible, widely used in matters related to the enforcement of social rights, such as the right to health, argues that the fulfillment of certain obligations depends on the availability of public resources. Originally developed in Germany, this theory is invoked when the State claims that, due to budgetary limitations, it cannot meet all individual demands without compromising the provision of other essential services.

In the case of judicial decisions related to the treatment of prostate cancer patients, the explicit absence of the reserve of the possible in the rulings might suggest that judges prioritize other justifications, such as insufficient documentary evidence or the lack of technical justification. However, even without direct mention, the logic of the reserve of the possible may be implicit in many cases, where the judiciary needs to balance the State's limited resources with the growing number of judicial demands.

In unfavorable decisions involving high-cost treatments, judges could invoke the theory of the reserve of the possible as a way to limit judicial intervention in health public policies. The central argument would be

that, although the right to health is constitutionally guaranteed, its implementation must respect the financial limits of the State, to avoid compromising other equally essential services. In this context, the application of this reasoning could justify the denial of treatments not included in public health policies or those requiring excessive investments. This application seeks to prevent creating precedents that would oblige the State to provide expensive treatments to all patients, potentially compromising the sustainability of SUS and resulting in a budget crisis.

The tension between the right to health and the reserve of the possible lies in the collision of two fundamental rights. On one side, the right to health guarantees universal and equal access to treatments, as outlined in Article 196 of the Federal Constitution. On the other side, the reserve of the possible proposes that the State's capacity to offer these rights depends on its financial resources. In unfavorable decisions, particularly those involving experimental medications or high-cost treatments, judges might argue that the obligation to provide such treatments exceeds the financial limits of the State, especially when granting them would compromise the provision of essential services to the collective.

Although there is no specific example in the analyzed documents, it is possible to imagine a decision where the judge might use the theory of the "reserve of the possible" to justify the denial of an expensive treatment with the following reasoning: "Although the right to health is guaranteed by the Constitution, the granting of the requested treatment in this case, involving a very high-cost medication not included in SUS guidelines, exceeds the limits of the reserve of the possible. Providing this treatment would compromise the resources available for the care of other patients, thereby harming the provision of essential services to the collective."

Recently, the Supreme Federal Court (STF), in ruling RE 566.471 (Topic 6 of General Repercussion), established rigorous criteria for the judicial provision of medications not incorporated into the Unified Health System (SUS) lists, deepening the debate on the application of the theory of the reserve of the possible. This theory, used by the public authorities in judicialization cases, argues that fundamental rights, such as the right to health, must be guaranteed within the limits of the State's financial and budgetary capacities. By linking the provision of medications to technical requirements and robust scientific evidence, the STF ruling aims to harmonize the individual right to health with the sustainability of public policies[19].

According to the Court, the general rule is that the provision of medications not included in the official SUS lists should not be determined judicially, except in exceptional situations. In these cases, the patient must cumulatively prove that the medication is registered with ANVISA; there was a denial of provision through administrative channels; there are no available therapeutic alternatives within SUS; the medication is safe and effective based on high-level scientific evidence; the treatment is essential; and the patient cannot afford it. This stance exemplifies the practical application of the theory of the reserve of the possible by imposing objective criteria, limiting the impact of judicial demands on the public budget and the organization of SUS.

Furthermore, the STF reinforced the need for judicial decisions to be based on technical analyses conducted by specialized bodies, such as the Technical Support Center of the Judiciary (NATJUS) and the National Commission for the Incorporation of Technologies in SUS (CONITEC). These analyses are essential to prevent individual demands from compromising the collective management of SUS, a system based on the principles of universality, comprehensiveness, and equity. By prioritizing scientific criteria and efficient planning, the STF protects not only individual rights but also the collective interest and the viability of the public health system.

The STF decision reflects the search for a delicate balance: ensuring the fundamental right to health without compromising the efficiency and equity of SUS. In this context, the theory of the reserve of the possible should not be used as an automatic justification for denying rights but as a guiding principle for the rational use of public resources. Therefore, the Court determined that when the provision of medications is granted judicially in exceptional circumstances, the Judiciary must notify the responsible bodies to assess the inclusion of the medication in SUS's official lists. This measure aims to avoid the perpetuation of isolated decisions and promote an orderly and equitable expansion of access.

This approach demonstrates an evolution in jurisprudence, recognizing that health judicialization is a phenomenon that requires strategic and integrated treatment. By aligning individual rights with budgetary limitations and public policies, the decision contributes to consolidating a vision of social justice that respects SUS's universality. At the same time, it reaffirms the role of the reserve of the possible as an essential tool for the sustainable management of the system. Thus, the STF decision becomes a milestone in the attempt to reconcile judicial demands with the economic and structural realities of a public health system as complex as Brazil's.

It is recognized that the research has some limitations. The temporal and geographic scope may restrict the generalization of the results to other contexts. Additionally, not all judicial decisions are available in public databases, which may lead to a partial analysis. It is also important to highlight the variability in judicial decisions, which may be influenced by individual magistrates' interpretation of the application of the theory of the reserve of the possible. Nevertheless, the qualitative approach offers an in-depth view of judicial decisions regarding the treatment of prostate cancer patients in Pernambuco, allowing for a critical reflection on the role of the Judiciary in managing public health policies.

In conclusion, although the theory of the reserve of the possible was not directly mentioned in the unfavorable decisions analyzed, its logic may underlie many of the denials of expensive and innovative treatments. When judges justify their decisions based on insufficient evidence or the non-inclusion of treatments in SUS guidelines, the reserve of the possible may be implicitly used as a justification to balance individual rights with the State's financial limitations. However, this theory must be applied with caution to avoid compromising the realization of fundamental health rights. The discussion points to the need for a more structured dialogue between the Judiciary, health managers, and the legislature, seeking solutions that ensure SUS's sustainability without undermining access to treatments that the population needs.

IV. CONCLUSION

The judicialization of health, especially in cases involving high-cost treatments or medications not included in the Unified Health System (SUS) lists, reflects the tensions between individual rights and the State's budgetary limitations. This study highlighted how the theory of the "reserve of the possible" plays a central role in this debate, serving as a balancing criterion between the guarantee of fundamental rights and the sustainability of public health policies.

The analysis of judicial decisions revealed that most judges prioritize the right to health and human dignity, as guaranteed by the Federal Constitution. However, in cases where requests were denied, the main grounds for rejection included insufficient medical evidence, lack of adequate technical or financial justifications, and incompatibility with SUS's therapeutic guidelines. Although the theory of the reserve of the possible was not explicitly mentioned in many decisions, its underlying logic is perceptible, especially in denials based on high costs or incompatibility with existing public policies.

The recent decision of the Supreme Federal Court (STF) in RE 566.471 reinforces the need for stringent criteria for the judicial provision of medications not incorporated into the SUS lists. By linking the provision of these treatments to technical requirements, proof of efficacy, and financial analyses, the STF contributes to strengthening the collective management of the health system. This approach reflects an attempt to align individual demands with the planning and sustainability of SUS, reaffirming that the theory of the reserve of the possible should not be used to arbitrarily deny essential rights, but as a principle that ensures the rational use of public resources.

Despite significant advances in case law, challenges remain. This study recognizes that the application of the theory of the reserve of the possible, while necessary, must be cautious to avoid using budgetary restrictions as a pretext for failing to uphold fundamental rights, especially in life-threatening cases. It is crucial for managers, judges, and legislators to promote a more structured dialogue, ensuring that SUS continues to

provide universal and equitable access to health.

Finally, the limitations of this study, such as its temporal and geographical scope and the restriction to available decisions, suggest the need for future research to expand the analysis to other contexts and scenarios. Still, the findings provide a basis for reflection on the role of the Judiciary in managing public health policies and how to balance individual and collective rights in a public health system as challenging as Brazil's. The challenge of reconciling the protection of fundamental rights with the efficiency of SUS remains, but the careful and contextualized application of the theory of the reserve of the possible may offer paths to more balanced and sustainable solutions.

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